In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1079~~ 15

SARA BAIRD, *Petitioner,*

vs.

STATE BAR OF ARIZONA, *Respondent.*

Brief for Respondent

MARK WILMER
400 Security Building
Phoenix, Arizona 85004
Counsel for Respondent

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

INDEX

CITATIONS

Cases

Statutes

Constitutional Provisions

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1079

SARA BAIRD, *Petitioner,*

vs.

STATE BAR OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Arizona

Brief for Respondent

JURISDICTION

A serious question is presented as to whether or not the order of the Arizona Supreme Court as to which certiorari is directed meets the test of finality required by Title 28, Section 1257 U.S.C.

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62
N.A.A.C.P. v. Williams, 359 U.S. 550
Grays Harbor Logging Co. v. Coats Fordney Co., 243 U.S. 251
Bruce v. Tobin, 245 U.S. 18
Mississippi Central Ry. Co. v. Smith, 295 U.S. 718

While not excerpted in Petitioner's Appendix, the Response of the Committee to the Order to Show Cause is before the Court. In its Conclusion the Committee stated to the Court at pages 7 and 8 thereof:

> "The Committee would again emphasize that it has formed no judgment as to whether or not Sara Baird should or should not be recommended for admission to the Bar of this State to this Court.
>
> "The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' the Committee will then endeavor to ascertain if Sara Baird does adhere to the view that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she would expect to actively support such views. If this is the conclusion reached by the Committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona. Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission to practice law under the decisions of the United States Supreme Court which have been reviewed in this Memorandum and also in the Memorandum of counsel for the petitioner."

The Petition addressed to the Arizona Supreme Court by Petitioner prayed alternatively:

> "WHEREFORE, your petitioner prays that this Court make and enter its order requiring the Committee on Examinations and Admissions of the Supreme Court of the State of Arizona to be and appear before this Court at a date and time certain then and there to show cause, if any it may have, why petitioner should not forthwith be recommended for admission to the State Bar, or, in the alternative, to show cause why

petitioner's application should not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit." Baird App. 3

INTRODUCTION

Petitioner has not stated the posture of her application to the Arizona Supreme Court Committee on Examinations and Admissions (hereinafter "Committee") either accurately or fairly. Neither has the action of the Arizona Supreme Court been accurately nor fairly reported.

Petitioner has not been denied admission to practice as an attorney at law in Arizona by the Arizona Supreme Court.

The Committee has not refused to recommend to the Arizona Supreme Court that Sara Baird be either admitted to practice nor denied that privilege.

The Committee has advised Sara Baird that it has not completed its character report and that it cannot do so until she completes her application papers. The Committee, contrary to the repeated assertions and insinuations to the contrary in Petitioner's Brief, has also made it abundantly clear that *regardless of the political beliefs and views of Sara Baird it is only if she is found to actively believe in the notion and espouses an activist role in implementing the notion that our government be destroyed by force and violence* that a favorable recommendation will be refused her by the Committee. And even as to this there is no final action by the Committee.

While the Committee has made plain its views as held by its present members, there is no certainty either that these views will remain unchanged or that the Committee as presently constituted, will not be otherwise constituted when a final decision is made by the Committee. The

Committee serves at the pleasure of the Arizona Supreme Court. Rule 28(a), Rules of Arizona Supreme Court, App. A, post p. 1.

Accordingly, since Petitioner has voluntarily answered question 25 by listing all organizations of which she has been a member since age 16, she has limited her objection to answering question 27 to an objection to stating whether or not she is or has been a member of "any organization that advocates overthrow of the United States Government by force and violence."

QUESTIONS PRESENTED

Petitioner does not present the questions for review accurately or succinctly. As will readily appear from our concise statement of the case and the following argument, in substance three questions are presented. One of miniscule proportions, the other two of some substance.

Question 1. Assuming the validity of Petitioner's argument that she had already answered the question complained of (Petitioner's Brief on the Merits (hereinafter P.B.) 2, 10, 23, 25, 32, 33), does the requirement that she answer an additional question by a simple "yes" or "no" present a constitutional question (if any) of sufficient magnitude to warrant expending the judicial time necessary to elucidate an answer?[1]

Question 2. Is a determination as to whether or not an applicant for admission to practice as a lawyer, actively believes in, advocates and will seek the overthrow of the Government of the United States by force and violence,

1. Petitioner's argument runs—since in answer to question 25 I have already listed *all* organizations to which I have belonged or now belong since age 16, necessarily, in addition to disclosing membership or non-membership, present or past, in the Communist Party, I have also named all other organizations to which I have belonged or now belong and thereby disclosed membership or non-membership in any organization which advocates overthrow of the Government of the United States by force and violence.

a legitimate subject of inquiry by the admitting authority of a state?

Question 3. May an applicant for admission to the practice of law before a State Supreme Court refuse to answer questions legitimately bearing upon the qualifications of such applicant to practice as an attorney upon the ground that to do so may incriminate such applicant?

STATEMENT OF THE CASE

Undoubtedly through failure to re-examine the proceedings below Petitioner has made a material misrepresentation to the Court by asserting as a fact that Petitioner has been "denied admission to the State Bar of Arizona for that reason alone (refusal to answer question 27) by the Supreme Court of Arizona." This is untrue.

The Committee has not refused to recommend to the Arizona Supreme Court that Petitioner be admitted to the practice of law in Arizona nor has the Arizona Supreme Court denied this privilege or right to the Petitioner.

The Committee has in express language advised Petitioner:

(a) if you admit that you are or have been a Communist or have been a member of any similar organization, we will still recommend your admission to practice because we cannot legally do otherwise unless

(b) the Committee finds you presently actively adhere to and expect to support and advance a belief that the Government of the United States should be overthrown by force and violence;

(c) in which event the Committee in its present view of the matter would recommend against your admission to the practice of law.

After so advising the applicant, the Committee, while conditionally admitting the applicant to the examination

and conditionally processing her examination paper, suspended further inquiry as to the character and moral fitness of the applicant to practice law.

Instead of cooperating with the Committee to the end that its obligation to the Arizona Supreme Court of investigating and reporting upon the character and moral fitness of each applicant for admission to the practice of law might be faithfully discharged, Petitioner refused to do so and initiated the proceedings by Petition to the Arizona Supreme Court for an order requiring the Committee to show cause why it should not either forthwith recommend the admission of Petitioner or, alternatively complete the processing of her application without requiring an answer to question 27.

This the Arizona Supreme Court refused to do. The Committee has not and cannot in good conscience certify to the Arizona Supreme Court that Sara Baird has the character and moral fitness to practice law if she does actively support and advocate the overthrow of the Government of the United States by force and violence.

SUMMARY OF ARGUMENT

Since Petitioner listed all organizations of which she was a member, the only issue here is whether or not a state admitting authority can inquire of an applicant for admission to practice law whether or not the applicant believes in and will advance the notion that the Government of the United States should be overthrown by force and violence.

The Arizona Committee affirmatively advised Petitioner that political affiliations, Communist or otherwise, would not disqualify her for a favorable recommendation unless she actively believed in and proposed to advance the overthrow of the United States Government by force and vio-

lence; hence the right of association with and the right to subscribe to unpopular political beliefs is not involved.

The right to take refuge in First and Fifth Amendment rights by an applicant for a certification of fitness to follow and practice a profession such as an attorney at law stands on a different ground from the right of an applicant for a job as a teacher or mail carrier. It also stands upon a different ground from the right of one already certified to practice law to invoke those privileges to defend his established qualifications.

ARGUMENT

Preliminary Statement

Petitioner has ranged far afield from the one issue here involved and in so doing has set up many tottering straw men and then promptly blown them over with great learning and much gusto. Petitioner's Brief is undoubtedly interesting, stimulating and informative and should greatly enhance the reputation of counsel as a learned barrister, but the many pages of discussion of various constitutional holdings of the Court and other precedents shed but a weak and flickering light upon the sole problem in this proceeding—they serve to obscure rather than determine the issues.

This responding Brief will not accept the challenge to debate interesting but unrelated constitutional problems. There are in essence three questions which may be stated. The first may be disposed of somewhat summarily—"a horse quickly curried." The second and third questions, once the underbrush of unrelated argument and citation of authority is cut away may also be disposed of quickly.

Question First

Assuming the validity of Petitioner's argument that she had already answered the question complained of (Peti-

tioner's Brief on the Merits (hereinafter P.B.) 2, 10, 23, 25, 32, 33), does the requirement that she answer an additional question by a simple "yes" or "no" present a constitutional question (if any) of sufficient magnitude to warrant expending the judicial time necessary to elucidate an answer?[1]

If it is true as Petitioner asserts, that by answering question 25 she also answered question 27, then this is indeed a tempest in a teapot—and a small pot at that. This entire proceeding would assume the character of a frivolous controversy and an imposition upon the time of the Court if Petitioner's position be accepted. A refusal under this circumstance to write a further short answer—yes or no—could only be characterized as an exercise in intransigency.

Petitioner is wrong.

The question serves a legitimate and useful purpose. The Committee cannot know nor can it readily ascertain the purposes and intended objectives of every organization which may be listed in answer to question 25. Assume an answer including an organization by name such as "The Sons and Daughters of I Will Arise." This could truly be a Christian group with religious objectives. But also it could be an organization devoted to the objectives of Lenin, Stalin or any other deceased person whose teachings and objectives were not conducive to the continued security and welfare of our government and way of life.

Only the applicant might have firsthand knowledge and

---

1. Petitioner's argument runs—since in answer to question 25 I have already listed *all* organizations to which I have belonged or now belong since age 16, necessarily, in addition to disclosing membership or non-membership, present or past, in the Communist Party, I have also named all other organizations to which I have belonged or now belong and thereby disclosed membership or non-membership in any organization which advocates overthrow of the Government of the United States by force and violence.

the ability to inform the Committee as to this reasonably important information. The Committee has neither the time nor the resources to investigate the nature and objective of each organization which an applicant may identify. Accordingly the question is needed and helpful to the Committee.

Question Second

Is a determination as to whether or not an applicant for admission to practice as a lawyer, actively believes in, advocates and will seek the overthrow of the Government of the United States by force and violence, a legitimate subject of inquiry by the admitting authority of a state?

This question presents the real issue in this cause since the claim of self-incrimination which Petitioner now argues strenuously is not in issue unless Petitioner now disavows her verified representation to the Arizona Supreme Court that Petitioner "fully and truthfully answered Question No. 25 of the Questionnaire and Affidavit which question reads as follows:

> 'List all organizations, associations and club (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.'" Baird App. 2, 3;

and her representation to this Court to the same effect. Opening Brief 6, 9, 10, 25, 33.

A fair reading of the position of the Committee presents then the one real question here in issue, which is—should one who believes that the Government of the United States should be destroyed by force and violence and who in fact is willing to actively participate in such activity be extended the privileges, responsibilities and powers of an attorney at law?

Stated otherwise, should one who entertains the view that a lawyer should seek and support the violent over-

throw of the Government of the United States by force and violence be admitted to the practice of law so that he may implement these views through use of his powers and privileges as an attorney at law?

Such is a fair reading of the position of the Committee objectively examined apart from scattered excerpts therefrom. Baird App. 5, 6.

There is a distinction—and a legitimate distinction—between what may be required of one who seeks certification from an officer, agency or other body that such applicant has the ability, character and fitness necessary to serve the state, nation or public in a capacity which requires public responsibility as well as ability and integrity and what may be a sufficient showing to warrant taking away a vested right to discharge such functions.

In the first case the applicant has not demonstrated the requisite character and ability to function in an area of public responsibility and is seeking to establish to the required satisfaction of those having the responsibility for certifying to the public that the applicant may be safely turned to for help.

But in the second case the person involved in the inquiry has demonstrated the required ability, integrity and sense of responsibility and thus may rest upon the record since he or she is not petitioning anyone for a certification that the required ability, integrity and sense of responsibility are attributes of the individual involved. Cf. *Orloff v. Willoughby,* 345 U.S. 83.

Thus *Spevack v. Klein,* 385 U.S. 511, is not controlling. Here there is no threat of disbarment and loss of professional reputation and standing. True, continued refusal on the part of Petitioner to permit the Committee to complete its investigation will, as long as continued, bar Petitioner from pursuing her livelihood in the practice of law, but

this is a quite different situation from that faced by the Petitioner in *Spevack*.

Further, the case does not involve either the disbarment or the admission to practice of a lawyer or a would-be lawyer—it involves the right of a State Supreme Court to require that its Committee satisfy itself that, among other things, those admitted to practice law will not foment rebellion, riot and great public discord. Only that and nothing more.

In commenting upon the responsibility, and accordingly the broad discretion, State Supreme Courts have in prescribing standards for admission to practice, Judge Stanley Barnes, speaking for the Court said in *Hackin v. Lockwood*, 361 F.2d 499 (C.A. 9, 1966):

> "Just as the Supreme Court in *Schware*, infra, refused (353 U.S. at 239 n. 5, 77 S.Ct. at 756) to go into any discussion whether the practice of the law is a 'right' or a 'privilege,' we need not do so. In either event, any restriction on such practice must be valid, i.e., reasonable. (Compare Lathrop v. Donohue, 367 U.S. 820, 844, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).)
>
> "We agree with appellant that for the requirement to be reasonable it must not be arbitrary; the reason for the prevention of practice must be valid. Power Manufacturing Co. v. Saunders, 274 U.S. 490, 493, 47 S.Ct. 678, 71 L.Ed. 1165 (1927).
>
> "'A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.' Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct. 752, 1 L.Ed2d 796 (1957).
>
> "Any classification can, in a sense be claimed arbitrary. Is it arbitrary or unreasonable for Arizona to require that an extraordinarily bright legal student, twenty years of age, who has graduated from an ac-

credited law school, wait until he is twenty-one before he can take the examination? We think not. Knowledge may be acquired early by a bright and assiduous student, but the odds are that his judgment will not be so soon acquired. It would be entirely possible, of course, were we to envision a twenty year old law school graduate, that his judgment would be as good or better than one who graduates at twenty-five, but it is probable that it would not.

> "'To a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts [in prescribing rules of admission]. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession.' Mr. Justice Frankfurter, concurring, in Schware v. Board of Bar Examiners, 353 U.S. at 249, 77 S.Ct. at 761." 361 F.2d at 502, 503

District Judge Wollenberg in *Soltar v. Postmaster General of the United States,* 277 F.Supp. 579 (U.S.D.C. N.D. Cal., 1967) recognized that the requirements of an applicant as a postal clerk were quite different from the requirements of an applicant for the high privilege of practicing law as an officer of the Court. Judge Wollenberg quoted from *Konigsberg v. State Bar of California,* 366 U.S. 36 as follows:

> "It would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions." 277 F.Supp. at 580

Judge Wollenberg then went on to say:

"Hence First Amendment rights were 'outweighed by

the State's interest in ascertaining the *fitness of the employee for the post he holds.*' 366 U.S. at 52, 81 S.Ct. at 1008. (emphasis Judge Wollenberg's) In the present case, plaintiff seeks employment as a postal clerk. The Government has not brought forth any significant federal interest which would necessitate the inquiry at hand. Indeed, the Government probably has no interest which would suffice to override the First Amendment rights here at issue. As aptly stated by Justice Douglas in Elfbrandt, supra, 384 U.S. at 17, 86 S.Ct. at 1241:

> "'Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as *public employees.*'" (emphasis Judge Wollenberg's) 277 F.Supp. at 580

The issue is simple. "Is one who believes in and who is willing to work to undermine and destroy the Government of the United States qualified to be admitted to the practice of law?"

We find it hard to believe that the affirmative of this question would ever be seriously asserted.

We do not propose to discuss the loyalty oath cases or the cases dealing with the questions of "guilt by association" or the right to hold political beliefs which are unpopular.

These cases lead us far afield.

First, the loyalty oath cases do not stand for the principle that it is not material to a person's employment whether or not such person would seek to destroy or be in sympathy with an effort to destroy the United States Government. They stand against the notion that membership in or association with organizations hostile to the integrity of our government, without active espousal of the tenets of such organization, is ~~in~~sufficient to bar one from public employment. That, and for the requirement that vague and overly

broad language may not be employed in spelling out the requirements of such statutes.

Here there is no such niceness required. The applicant may answer simply "I don't know what the organization in question advocates" if such be the fact. The argument that Sara Baird, under penalty of perjury, must research the aims and purposes of each organization to which she may have belonged is sheer nonsense. If she knows she says so—if she doesn't she simply states her memberhip and reports her inability to further answer the question.

Secondly, the "guilt by association" cases are wholly inapplicable, for the Committee has advised Mrs. Baird and reported to the Arizona Supreme Court

> "Should the conclusion be that her membership is of a nominal character and that she does not participate and adhere to the views that a violent overthrow of our government is desirable, then the Committee would have no legal basis for refusing to recommend her for admission * * " (Response of Committee to Order to Show Cause)

Accordingly the decisions which condemn sanctions because of mere membership in an organization are not in point.

Lastly, the "political belief" cases are disregarded. Activity of a violent character aimed at revolution, public disorder and murder of public figures and destruction of public institutions is no more activity of a political nature than is looting, stealing and burning in connection with anti-segregation or similar demonstrations. Nor is the belief that such violent overthrow of our government is a desirable end to achieve a political belief.

We simply refuse to dignify such arguments by treating them seriously.

Question Third

May an applicant for admission to the practice of law before a State Supreme Court refuse to answer questions legitimately bearing upon the qualifications of such applicant to practice as an attorney upon the ground that to do so may incriminate such applicant?

Sara Baird did not refuse to answer question 27 upon any constitutional grounds in her execution of her affidavit and questionnaire. Her reason was that the question was "not applicable." (Baird App. 2) She did ~~not~~ assert a self-incrimination claim in her Petition to the Arizona Supreme Court.

The only time this Court has spoken, insofar as we are advised, as to the limitations upon the right of an applicant to invoke the Fifth Amendment privilege against self-incrimination is in *Orloff v. Willoughby, supra.* The case is not entirely in point. Neither is *Spevack v. Klein, supra.*

We realize that merely because required observance of a constitutional privilege may be burdensome or expensive does not justify refusing to respect that right or privilege. We approach a consideration of the problem with that principle in mind.

It is said, loosely, that entry upon the practice of the law is a "right." *Application of Klahr,* 102 Ariz. 529, 433 P.2d 977.

Manifestly this is only a broad generalization. The right may be circumscribed with precautions designed for the protection of the public. *Hackin v. Lockwood, supra.*

A more accurate statement would be that one qualified by character, integrity and learning has the right to practice law. The right is not then an absolute right—it is a right subject to a condition precedent, *a condition precedent which the applicant must satisfy.*

If the "right" to practice law were on the same plane as the "right" to become a farmer, then indeed there might

be some reasonable basis for asserting that inquiry as to character and integrity should be foreclosed upon First and Fifth Amendment grounds. But the law reposes no special confidences and privileges in the farmer nor does his lack of integrity or character expose the public to hazard. Neither does his occupation of itself (in most jurisdictions at least) qualify him for judicial office, by appointment or election, or otherwise make available to him opportunities to work harm to the body politic.

Therefore the states are justified in saying to the applicant to enter upon the practice of the law—demonstrate your fitness for this profession. Show that your character, integrity and education are such that our Supreme Court can certify, by authorizing you to practice law, that the public can safely trust their property, their liberty and indeed their lives to your ministrations, guidance and management.

There is then a valid basis for the different results reached in *Orloff* and *Spevack*. In one the Fifth Amendment was invoked to bar an inquiry as to whether or not the applicant had the qualifications required for admission to the Medical Corps; in the other, Spevack, who had theretofore demonstrated that he was qualified to practice law, resisted an encroachment upon this established right through an attempt to violate his right of privacy and his privilege against self-incrimination.

We believe the distinction is valid.

It does not seem reasonable that a Bar Examination Committee, in considering the qualifications of an applicant to practice law in response to their obligation to certify only those affirmatively found qualified by training and character, should be frustrated by the applicant invoking First or Fifth Amendment privileges.

In one voice the applicant says "Admit me, I am honest, my character is good and I am qualified to be authorized to practice law," but immediately after making this representation to the Committee he frustrates the Committee's efforts to confirm that his representations are true by, in response to questions designed to assure the Committee that his representations are true, refusing to answer upon the ground that thereby some criminal activity may be exposed.

Illustratively, suppose an Arizona Committee has reliable information that an applicant for certification by it as to his honesty and integrity had been discharged for embezzlement from a New York City financial institution. If the New York City financial institution, while confidentially confirming that such is the case, refuses "to become involved" and the applicant takes the Fifth Amendment, must the Committee then certify to the Arizona Supreme Court that the applicant has the honesty and integrity to justify admission to practice?

CONCLUSION

The Arizona Supreme Court Committee on Examinations and Admissions should be permitted to complete its processing of the Baird file. The refusal of the Arizona Supreme Court to interfere with legitimate inquiry by the Committee should be affirmed.

Respectfully submitted,

MARK WILMER
400 Security Building
Phoenix, Arizona 85004
Counsel for Respondent

August 1969

(Appendix Follows)

Appendix A

RULES OF THE SUPREME COURT

V. Admission and Discipline of Attorneys

Rule 28. Examination and Admission

Rule 28(a) Committee on examinations and admissions; powers and duties. The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court upon the recommendation of the board of governors of the state bar which shall recommend at least three members of the state bar for each appointment to be made. The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions heretofore adopted and made effective May 25, 1948, and as amended effective February 1, 1954, and such other rules as hereafter may be adopted. The court will then consider the recommendations and either grant or deny admission. As amended effective June 19, 1964.

No. 15

Supp. record filed.
(not printed)
(filed Dec 15, 1969)